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IN THE

Supreme Court of the United States

OCTOBER TERM, 2003

MICHAEL ROBLES,
Petitioner,

--against--

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the "conscious avoidance" doctrine may be used in a conspiracy case to establish the defendant's intent to join the conspiracy; whether the instruction may be given when the government's case rests on actual knowledge; and, whether, if there is no evidence of deliberate ignorance, it is harmless error as a matter of law to give the instruction when the government has introduced evidence of actual knowledge.

2. Whether in a securities fraud prosecution, venue lies in the district where the securities trade was "executed" even though neither the defendant or his co-conspirator ever set foot in that district because the defendant could have foreseen that execution could take place there; and whether, notwithstanding United States v. Gaudin, 515 U.S. 506 (1995), venue need only be proved by a preponderance of the evidence.

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OTHER AUTHORITIES

Norman Abrams, Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula,
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Steven A. Engel, The Public's Vicinage Right: A Constitutional Argument,
75 N.Y.U.L. Rev. 1658 (2000) 19

Albert J. Harno, Intent in Criminal Conspiracy,
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Ira P. Robbins, The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea,
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1 Underhill's Criminal Evidence,
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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at United States v. Svoboda, 347 F.3d 471 (2d Cir. 2003), and is set forth at App. 1. The order denying petitioner's petition for rehearing and rehearing in banc is not reported, and is set forth at App. 36.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Second Circuit was entered on October 24, 2003. (App. 1) Petitioner timely filed a petition for rehearing and rehearing in banc, which was denied on January 16, 2004. (App. 36) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .

Article 3, section 2, clause 3 of the Constitution provides:

> The Trial of all crimes, except in Cases of Impeachment, shall be by Jury; and such trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

STATEMENT OF THE CASE

This Petition raises two important constitutional issues arising from a charged two-person conspiracy involving allegations that two Texans, petitioner Michael Robles and his best friend Richard Svoboda, "hatched an illegal plan" to trade on inside information available to Svoboda through his job at NationsBank. (A. 36)[1] Indicted and tried in the Southern District of New York, Robles was convicted on October 3, 2002, of conspiracy to commit securities and tender offer fraud and substantive counts that charged securities and tender offer fraud.

Robles was sentenced to a term of imprisonment of 41 months, with three years supervised release, and was ordered to pay a fine in the amount of $300,000. (A.118-23) On October 24, 2003, the Second Circuit affirmed his conviction. (App. 1)

1. The first issue raised in this Petition is one that, in recent years, has caused considerable confusion among the lower courts. It concerns the propriety of a conscious avoidance jury instruction in conspiracy cases, when the jury is permitted to satisfy each of the mens rea elements of conspiracy through conscious avoidance. In this case, where the government staked its case on its assertion that the two conspirators together "hatched" a scheme to trade on inside information, the last-minute addition of a conscious avoidance charge permitted the jury to convict Robles even if it entirely disbelieved the government's evidence. Worse, it allowed the jury to find that Robles joined the two-person conspiracy through conscious avoidance.

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[1] References to "A" are to the Appendix filed by Robles with the Second Circuit, which includes, among other things, the Indictment, the Judgment, and excerpts from the trial transcript.

2. The second issue raised in this Petition concerns the propriety of venue in the Southern District of New York, where petitioner conducted each of the trades at issue online from his desk in Dallas, Texas, and where there was no evidence that petitioner or his sole co-conspirator ever set foot in New York, that any of the conversations or activity between the alleged co-conspirators took place in any place other than in Texas, that petitioner directed the trades or any other activity to take place in New York, or that the "execution" of the trades on stock exchanges located in New York City was anything more than electronic computer blips that were routed through New York. Petitioner also contends that the standard of proof for venue, as for any other element, must be beyond a reasonable doubt.

CONSCIOUS AVOIDANCE

Robles and Svoboda were indicted jointly, and planned a joint defense. Svoboda negotiated an eleventh-hour deal with the government, agreeing to testify.

The conspiracy count alleged that Svoboda misappropriated inside information from NationsBank and disclosed such information to Robles; that Robles purchased and sold securities while in possession of such information; that Robles provided Svoboda with a portion of the illegal profits; and that Svoboda provided funding to Robles to facilitate Robles' trading activities. (A. 23-24, 26-27)

Svoboda testified that he told Robles that the information he was giving him was "inside information." (A. 49-50) Svoboda testified about specific conversations that he and Robles had in late 1994 planning to use information, available to Svoboda as a NationsBank credit policy officer, about upcoming mergers and acquisitions being conducted by the bank's clients.

The government tried its case solely on the theory that Robles had actual knowledge that he was trading on confidential

information. The evidence it presented, primarily through Svoboda, was consistent with that theory. Indeed, at the close of the government's case, the prosecutor expressly stated to the judge that:

> it continues to be the Government's position ... that based on the evidence and the Government's case I don't see a need for a conscious avoidance charge.

(A. 70-71) (emphasis supplied). He noted, however, that the issue could emerge through cross-examination of Robles, if Robles chose to take the stand. (A. 71)

Robles took the stand and denied Svoboda's allegations, including Svoboda's contention that they made an agreement to trade on inside information. The government then sought a conscious avoidance charge. (A. 87-88)

Although the trial judge had acknowledged several times that he had "always thought that this [was] a credibility case" between Svoboda and Robles, over defense objection (A. 88), the Court granted the government's last-minute request. (A. 88) Moreover, it noted that the instruction would be given, as the government had requested, in connection with all of the counts, including conspiracy.

The government, in its closing, argued to the jury that it should convict, even if it disbelieved Svoboda entirely, since "anyone in [Robles'] position would have known what's going on."

The charge to the jury included the following language:

> To satisfy its burden of proof beyond a reasonable doubt that Mr. Robles knowingly, willingly and unlawfully entered into the

> conspiracy, i.e., into the agreement, and that he did so with a criminal intent, that is, with a purpose to violate the law, and that he agreed to take part in the conspiracy to promote and cooperate in its unlawful objective or objectives. I will now define the terms which I have used, knowingly, willingly and unlawfully. An act, first of all, is done knowingly if it is done deliberately and purposefully, that is, Mr. Robles' act must have been the product of his conscious objective rather than the product of a mistake or accident or mere negligence or some other innocent reason.

(A. 98)

In the context of the remaining substantive count instructions, the judge again instructed the jury with numerous charges dealing with "knowledge." (See A. 99-102) The jury was told, among other things:

> I have already defined knowingly, willfully and intentionally for you for which you are very grateful. For the defendant to have acted with the specific intent to defraud means that he must have known of the fraudulent nature of the scheme and acted with the intent that it succeed. In other words, to act with an intent to defraud means to act knowingly and with the specific intent to deceive ordinarily, but not necessarily for the purpose of causing some loss to another or to bring some gain to one's self. (A. 102) (Emphasis added)

Finally, toward the close of the jury instructions, the district court ended with "additional charges," which included the following charge on conscious avoidance:

> In determining whether the defendant acted knowingly, you may consider whether the defendant deliberately closed his eyes to what would otherwise have been obvious to him. If you find, beyond a reasonable doubt, that the defendant acted with a conscious purpose to avoid learning the truth, that he was trading on the basis of insider information, then this element may be satisfied. However, guilty knowledge may not be established by demonstrating that the defendant was merely negligent, foolish or mistaken. If you find that the defendant was aware of a high probability that he was trading on the basis of insider information, and that the defendant acted with deliberate disregard of the facts, you may find that the defendant acted knowingly. However, if you find that the defendant actually believed he was not receiving inside information, he may not be convicted. It is entirely up to you whether you find that the defendant closed his eyes, and any inferences to be drawn from the evidence on this issue.

(A. 106) The conscious avoidance instruction was not tailored to any particular aspect of the lengthy charges preceding it. It was made applicable to any prior reference to findings of "knowledge," thus allowing the jurors to use conscious avoidance to find Robles' participation in the conspiracy.

VENUE

Prior to trial, Robles objected to venue in the Southern District of New York. (A. 67-69) At trial, the only evidence relevant to venue in the Southern District came from documentary evidence confirming the execution of buy or sell orders, and from Peter Sullivan, a New York City employee of Charles Schwab & Co. Robles had a brokerage account with

Schwab, through which he made the trades at issue, using Schwab's on-line brokerage services; Schwab generated the confirmation documents and forwarded them to Robles.

Sullivan testified that both the New York Stock Exchange and the American Stock Exchange are located in Manhattan (A. 38), and that Schwab's written confirmation of trades indicated "where the order was executed." (A. 39) Some of these trade confirmations, including those that pertained to the purchases or sales that formed the basis of the substantive counts, showed the "market where executed" to be the American or New York Stock Exchange. (see, e.g., A. 111, 115)

DECISION

The Second Circuit affirmed. In a decision that is in conflict with those of other Circuits – and with theretofore established Second Circuit precedent – it upheld the application of the conscious avoidance doctrine to all aspects of a conspiracy charge. Although previously permitting conscious avoidance to be used, in the conspiracy context, only to find a defendant's knowledge of the illegal objects of the conspiracy, in this case, the Second Circuit concluded that conscious avoidance could be used to establish a defendant's intent to join a conspiracy where there is "further proof that the defendant joined in the illegal agreement with the intent of helping it succeed in its criminal purpose." (App. 16)

As to venue, the Court ruled that "venue is proper in a district where (1) the defendant intentionally or knowingly causes an act in furtherance of the charged offense to occur or (2) it is foreseeable that such an act would occur in the district." (App. 17-18) In an insider trading prosecution, the execution of a trade on a New York exchange was such an "act," and the record supported an inference that a "savvy investor" like Robles "could reasonably foresee that his trades would likely be executed" on the NYSE or AMEX. (App. 18) The Court

rejected Robles' claim that venue must be proved beyond a reasonable doubt, on the ground that it had "repeatedly held" that venue is not an essential element. (App. 20-21)

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE CONFLICTS AND CONFUSION WITHIN AND AMONG THE CIRCUITS OVER THE PROPER APPLICATION OF THE CONSCIOUS AVOIDANCE DOCTRINE IN CONSPIRACY CASES

The first issue raised in this Petition relates to the traditional legal doctrine of conscious avoidance,[2] which, in its origination, was a narrow concept serving a specific purpose;[3] over time, its application has been so broadened that its purpose and meaning have been almost entirely lost.

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[2] Some courts refer to the charge as "willful blindness," some as "deliberate ignorance," and some as the "ostrich charge."

[3] Originally, the doctrine served as "a practical necessity[,] given the ease with which a defendant could otherwise escape justice by deliberately refusing to confirm the existence of one or more facts that he believes to be true." United States v. Reyes, 302 F.3d 48, 54 (2d Cir. 2002), citing Ira P. Robbins, The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea, 81 J. Crim. L. & Criminology 191, 196-202 (1990). However, as Professor Robbins notes, the substitution of the deliberate ignorance doctrine for the actual knowledge requirement is not a particularly well-established principle of the criminal law and was only recently revived in the 1970s by the onslaught of federal narcotics prosecutions. Id. at 199-203 & n. 72.

The "conscious avoidance" doctrine was developed to address those very limited circumstances where a defendant deliberately avoided learning the incriminating facts in order to evade responsibility for his conduct. Professor Glanville Williams described it this way:

> A court can find wilful blindness only where it can be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge.

Glanville Williams, Criminal Law: The General Part § 57 at 159 (2d ed. 1961). Traditionally, the instruction was allowed in the "comparatively rare cases" where the evidence "point[ed] in the direction of deliberate ignorance." United States v. Sanchez-Robles, 927 F.2d 1070, 1073 (9th Cir. 1991) (quotation omitted). That, in turn, meant it was appropriate only when the jury "is persuaded that the defendant consciously avoided learning [of a] fact while aware of a high probability of its existence." United States v. Finkelstein, 229 F.3d 90, 95 (2d Cir. 2000). See also United States v. Samaria, 239 F.3d 228, 239 (2d Cir. 2000).

Over time, however, the instruction has become standard in virtually any case in which knowledge is an element of the crime. And, more recently, as this case illustrates, the charge has been expanded to cover not only knowledge, but the very different requirement of intent, even specific intent. In effect, conscious avoidance has evolved into a powerful prosecution tool for establishing the mens rea of almost every federal crime, often when the government's proof of actual knowledge or intent is less than solid.

This dangerous trend has not gone unnoticed by the courts. As the Eleventh Circuit has observed:

> [D]eliberate ignorance is easier to prove than actual knowledge and . . . prosecutors should not be granted such a windfall advantage when the giving of such an instruction is not appropriate.

United States v. Rivera, 944 F.2d 1563, 1571, n. 30 (11th Cir. 1991).

This Petition asks this Court to address two separate issues: both the narrow issue of whether the doctrine of conscious avoidance may be used to establish a defendant's intent to join a conspiracy; and the broader question of when the instruction may properly be given, resolving conflicts within and among the Circuits over such questions as whether it requires evidence of deliberate ignorance or whether a "should have known" standard suffices; whether the instruction may be given when the prosecution's case rests on an "actual knowledge" theory; and whether it is always harmless error to instruct on conscious avoidance if there is proof of actual knowledge.

A. Conscious Avoidance in the Context of a Conspiracy

Conspiracy is a crime with several mens rea components. It "consists not merely in the agreement of two or more but in their intention." Albert J. Harno, Intent in Criminal Conspiracy, 89 U.Pa.L. Rev. 624, 630 (1945). Conspiracy involves two distinct states of mind: that necessary to form an agreement and that relating to the objects of that agreement. The government must prove that the defendant knew of the conspiracy and willfully joined it and that he knew of the conspiracy's illegal objectives and intended to further those objectives. See, e.g., United States v. Hernandez, 218 F.3d 58, 65 (1st Cir. 2000); United States v. Pickorey, 85 F.3d 4, 8 (2d Cir. 1996). Put another way, the government must establish, first, that the defendant "intended to engage in the charged scheme," that is, that he "knew the . . . conspiracy existed and that he knowingly and willingly joined in it;" and, second, that he had "knowledge

of the unlawful aims of the conspiracy. United States v. Reyes, 302 F.3d 48, 53 (2d Cir. 2002).

The Second Circuit, before this case, had long adhered to the rule that conscious avoidance may not be used to establish a defendant's intent to join a conspiracy. A long line of the Court's "precedents" had held that the doctrine could be used to establish "knowledge of the unlawful conspiracy," but not "to prove an intent to participate in a conspiracy." Reyes, 302 F.3d at 54. As the Court explained, "the reason for this distinction is that common sense teaches it is logically impossible to intend and agree to join a conspiracy if the defendant does not know of its existence." Id.[4] Or, as observed in United States v. Mankani, 738 F.2d 538, 547 (2d Cir. 1984), a person cannot consciously avoid participating in a conspiracy and also be a member of the conspiracy because the two notions are mutually exclusive.

In this case, the Second Circuit departed entirely from its precedent, labeling it "pure dictum." (App. 13) After noting that the "broad assertion that conscious avoidance may not be used to prove 'intent to participate' has a capacity to cause confusion," (App. 15), the Second Circuit added to the confusion by abandoning its prior case law, and permitting conscious avoidance to establish a defendant's intent to join a conspiracy

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[4] See also United States v. Tropeano, 252 F.3d 653, 660 (2d Cir. 2001)) ("a conscious avoidance theory may not be used to support a finding that the defendant intended to join or participate in the conspiracy"); United States v. Ferrarini, 219 F.3d 145, 155 (2d Cir. 2000) (same); United States v. Eltayib, 88 F.3d 157, 170 (2d Cir. 1996) (same); United States v. Beech-Nut Nutrition Corp., 871 F.2d 1181, 1195 (2d Cir. 1989) (same).

when there is "further proof that the defendant joined in the illegal agreement with the intent of helping it succeed in its criminal purpose." (App. 16)[5]

Under the Second Circuit's holding, not only may conscious avoidance be used to support a finding of a defendant's knowledge of the objects of the conspiracy – even in a conspiracy of two – but it may also be used to prove a defendant's intent to *join* a conspiracy if there is "further proof

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[5] Some other Courts seem also to be moving in that direction. See, e.g., United States v. Basroon, 38 Fed.Appx. 772, 781-82, 2002 WL 1118029, *7 (3d Cir. 2002) (unpublished) (the government could meet its burden of proving fraudulent intent through a conscious avoidance charge); United States v. Wert-Ruiz, 228 F.3d 250, 255 n. 3 (3d Cir. 2000) (affirming the use of a conscious avoidance instruction to find defendant's participation in a conspiracy "where the jury had ample evidence with which to conclude that, at a minimum, [the defendant] had willfully blinded himself to the fact that a criminal conspiracy existed").

Other Courts have affirmed conscious avoidance instructions in conspiracy cases without bothering to parse out the intent and knowledge elements, thus completely collapsing those separate requirements. See, e.g., United States v. Ciampaglia, 628 F.2d 632, 642 (1st Cir.), cert. denied, 449 U.S. 956 (1980) (conscious avoidance instruction delivered on the issue of intent, permitting jury to draw an inference as to whether defendants had willfully closed their eyes to their participation in a conspiracy); United States v. Picciandra, 788 F.2d 39, 46 (1st Cir. 1986) (upholding conscious avoidance instruction without addressing the doctrine's application to the intent component of conspiracy); United States v. Kehm, 799 F.2d 354, 362 (7th Cir. 1986) (expressly rejecting Second Circuit's traditional rule).

that the defendant joined in the illegal agreement with the intent of helping it succeed in its criminal purpose." (App. 16)

The Second Circuit did not identify what "further proof" was adduced as to Robles specifically; nor did it explain that inscrutable phrase for future application. As to Robles, the only evidence of his intent to join into a conspiracy with Svoboda was the government's proffer of actual knowledge – that is, Svoboda's own testimony that he and Robles agreed to trade on Svoboda's inside information. By thus permitting the same evidence of actual knowledge to double as the facts purportedly supporting deliberate ignorance, the Second Circuit eviscerated the separate requirement of intent, relaxing the standards by which the government can obtain a conspiracy conviction below a constitutionally permissible level.

The instant case presents a paradigmatic set of facts for addressing the appropriate application of the conscious avoidance doctrine in conspiracy cases because, in a conspiracy alleged to exist only between two persons, the dangers arising from the misapplication of conscious avoidance are clearly underscored. Here, through Svoboda's testimony, the government claimed that Robles and Svoboda expressly agreed to trade on inside information, and yet, according to the Second Circuit's decision, the jury was permitted to find an agreement between the two men solely through Robles's consciously avoiding knowing Svoboda's actions - a manifestly illogical notion. In a conspiracy of two, there can be no agreement between the conspirators if one person is found to have deliberately taken steps to avoid acquiring knowledge of their purportedly agreed-upon actions.

Conspiracy, in Judge Learned Hand's memorable words, is the "darling of the modern prosecutor's nursery." Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925). It is easy to prove and difficult to define. If conscious avoidance can be used to establish not only the knowledge of the existence of the

conspiracy, but also the defendant's intent to join the conspiracy, the mandate that the government prove, beyond a reasonable doubt, an "intent to agree" will have become virtually meaningless. This Court should take this opportunity to address this very significant, complex, and recurring question.

B. The Conflicts Within and Among the Circuits On The Standards For Charging Conscious Avoidance

On a broader level, the doctrine of conscious avoidance as a whole is in significant disarray, with a resulting broad variance in the standards applied by juries in the different Circuits, and even within a single Circuit.

There is disagreement, for example, over whether the government must introduce proof of deliberate or willful ignorance. The doctrine initially was intended to cover only situations where the defendant consciously took steps to avoid acquiring knowledge in order to insulate himself from liability. Yet, some courts have appeared to endorse a negligence standard that permits a jury to infer knowledge because a "reasonable person" would have known the true facts. In effect, an objective standard that examines a reasonable person's state of mind has been substituted for a subjective standard that examines the individual defendant's state of mind. See, e.g. United States v. Hiland, 909 F.2d 1114, 1130 (8th Cir. 1990) ("[i]n essence, a willful blindness instruction 'allows the jury to impute knowledge to [the defendant] of what should be obvious to him'"); United States v. Picciandra, 788 F.2d 39, 46 (1st Cir.), cert. denied, 479 U.S. 847 (1986) (upholding instruction because "[a]ny reasonable person would have realized" that bags of cash "signalled some form of illegal activity"); United States v. Nicholson, 677 F.2d 706, 710 (9th Cir. 1982) ("The circumstances surrounding the investment opportunity presented to [the defendant] would have put any reasonable person on notice that there was a 'high probability' that the undisclosed venture was illegal").

Other courts, however, have adhered to the principle that conscious avoidance cannot be based on a "should have known" standard. See, e.g., United States v. Ferrarini, 219 F.3d 145, 157 (2d Cir. 2000), cert. denied, 532 U.S. 1037 (2001); United States v. Rodriguez, 983 F.2d 455, 457 (2d Cir. 1993). Only recently, for example, the Second Circuit observed that a standard that permits a finding of guilt based on what the defendant "should-have-known" is a "concept more akin to negligence than to knowledge." Finkelstein, 229 F.3d at 95.

In addition, there is a conflict among the Courts about whether it is appropriate to charge conscious avoidance when the government's case rests on proof of actual knowledge. In this case, the Court approved of a conscious avoidance charge, although the government argued that Robles actually knew of the illegal trading. But other Courts seemingly (although not consistently) have reserved conscious avoidance for "those comparatively rare cases" where defendant claims a lack of knowledge and there are facts that point in the direction of deliberate ignorance. United States v. Garzon, 688 F.2d 607, 609 (9th Cir. 1982). As the Sixth Circuit has written: "Where the evidence relative to knowledge shows that the defendant had actual knowledge of the facts in question, or where the only evidence relative to knowledge shows that the defendant did not have actual knowledge and there is no evidence that the defendant made some deliberate effort to avoid obtaining actual knowledge, an instruction on deliberate ignorance is not appropriate." United States v. Abner, 35 F.3d 251, 255 (6th Cir. 1994),[6] (citing Hiland, 909 F.2d at 1130).

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[6] In United States v. de Francisco-Lopez, 939 F.2d 1405, 1410 (10th Cir. 1991), the Tenth Circuit emphasized that the same facts "cannot be used to prove both actual knowledge and deliberate indifference because the two are mutually exclusive concepts." See also United States v. Caliendo, 910 F.2d 429, 435 (7th Cir. 1990) ("if the evidence against the defendant points

Additionally, and related to the question of whether the charge may be given when the government's case rests on actual knowledge, the courts do not agree on whether the giving of a conscious avoidance charge lacking an evidentiary basis is harmless error as a matter of law if there is some evidence of actual knowledge. Compare United States v. Mari, 47 F.3d 782 (6th Cir. 1995) (if evidence of actual knowledge, but no evidence of conscious avoidance, harmless as a matter of law since jury would not have convicted on conscious avoidance theory); United States v. Adeniji, 34 F.3d 58, 63 (2d Cir. 1994) ("lack of evidence of conscious avoidance, coupled with evidence of actual knowledge, compels a finding of harmless error"); United States v. Stone, 9 F.3d 934 (11th Cir. 1993) (same), with United States v. Aguilar, 80 F.3d 329 (9th Cir. 1996) (since the jury could have "readily convicted the defendant on the basis" of the erroneous instruction, cannot be harmless error); and United States v. Hilliard, 31 F.3d 1509 (10th Cir. 1994) (not harmless error where direct evidence of knowledge but no evidence of deliberate ignorance).[7]

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solely to direct knowledge of the criminal venture, it would be error to give the [ostrich] instruction."); United States v. Rivera, 944 F.2d 1563, 1571 (11th Cir. 1991) ("a court should not instruct the jury on 'deliberate ignorance' when the relevant evidence points only to *actual knowledge*, rather than deliberate avoidance"); United States v. Alvarado, 838 F.2d 311, 314 (9th Cir.), cert. denied, 487 U.S. 1222 (1988) (conscious avoidance charge improper because the evidence tended to show actual knowledge, not deliberate avoidance of obtaining actual knowledge).

[7] But see United States v. Hanzlicek, 187 F.3d 1228 (10th Cir. 1999) (finding sufficient evidence of deliberate ignorance but seemingly adopting "harmless error as a matter of law

The consequences of the rule that a conscious avoidance charge must always be considered harmless error is that the prosecution will always request such a charge, and district courts will err on the side of including the charge even in situations where there is not a shred of evidence supporting the charge. The instant case highlights this problem. Here, the government fought hard for the charge and urged conviction even if the jury did not believe Svoboda's testimony, arguing that knowledge could then be established by conscious avoidance. Yet, after securing a guilty verdict, possibly predicated on the conscious avoidance argument, the government argued, on appeal, that the charge was harmless in light of Svoboda's testimony.

The courts have continued to pay lip service to the traditional underpinnings of the conscious avoidance doctrine, but have so broadened the doctrine, it has lost all meaning. Conscious avoidance, as it is now too often applied, tends to "allow juries to convict upon a finding of negligence for crimes that require intent." United States v. Carrillo, 269 F.3d 761, 769 (7th Cir. 2001), cert. denied, 535 U.S. 1004 (2002) (quotation omitted). The instruction often shifts the burden to the defendant to prove his innocence. The effect of a conscious avoidance instruction "in a case in which no facts point to deliberate ignorance may be to create a presumption of guilt." United States v. Murrieta-Bejarano, 552 F.2d 1323, 1325 (9th Cir. 1997). See also United States v. Fransisco-Lopez, 939 F.2d 1405, 1411 (10th Cir. 1991). And, finally, the "harmless error" rule has encouraged indiscriminate use of the instruction because, if the jury convicts, the prosecution can easily dismiss the importance of the instruction by pointing to the evidence of actual knowledge.

As the lower courts continue to expand the conscious avoidance doctrine, permitting it to be used to satisfy both the

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rationale," without reference to Hilliard).

intent and the knowledge requirements of conspiracy, permitting an "objective" rather than a "subjective" standard, and allowing it to be given when the evidence does not support it, the government, almost reflexively, will continue to demand the charge in any case in which the defendant's intent and knowledge are at issue. There is an urgent need for this Court to intervene and provide guidance to the federal courts on when it is constitutionally permissible to give this charge to the jury, particularly when intent is an element of the crime. Certiorari should be granted on this issue.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE IMPORTANT QUESTIONS INVOLVING THE PROPER TEST FOR VENUE AND TO DETERMINE THE APPLICABLE BURDEN OF PROOF

The second issue raised in this Petition presents questions that go to the heart of American criminal jurisprudence: the appropriate test for venue, and the proper burden of proof. In this case, venue was laid in the Southern District of New York, although all of the activities by the participants in this two person conspiracy took place in Texas. The basis for venue in New York was that, according to trade confirmations sent to Robles, the "market where [some of the trades were] executed," including the trades underlying the substantive counts, was the New York Stock Exchange ("NYSE") or the American Stock Exchange ("AMEX"). Both of those exchanges are located in the Southern District.

The Second Circuit found that there was no evidence that petitioner intended the trades to be executed on either the NYSE or AMEX; however, adopting language torn from a variety of cases, it held that "the fact that Robles was a savvy investor means that he could reasonably foresee that his trades would likely be executed on either NYSE or AMEX." (App. 29)

The highly unusual notion that venue is to be determined by a defendant's state of mind – by his intention or by foresight gained through sophistication as to where an on-line trade will be executed – constitutes a substantial break from this Court's precedent. The issue is thus worthy of this Court's consideration.

Venue is not a mere technicality, but has deep historical roots. The colonial commitment to local trials ran deep, so deep that it played a part in inspiring the American Revolution. Indeed, "the vicinage right was a recurring theme in the struggle for independence." Steven A. Engel, The Public's Vicinage Right: A Constitutional Argument, 75 N.Y.U.L. Rev. 1658, 1680 (2000).

> The generation that ratified the Constitution and the Bill of Rights recognized the vicinage presumption as an essential part of the right to trial by jury. In the struggle for independence, the colonists stood ready to defend "the inestimable Privilege of being tried by a Jury from the Vicinage." [Virginia Resolves (May 16, 1769), reprinted in Journals of the House of Burgesses, 1766-1769, at 214 (John Pendleton Kennedy ed., 1906)] The colonists inveighed against the British for abridging the vicinage right by taking defendants away to England for trial and by protecting British soldiers from the justice of colonial juries. A majority of the early state constitutions expressly protected the vicinage right, and the Antifederalists criticized the federal Constitution for failing to do so adequately. The First Congress framed the Sixth Amendment with an understanding that the traditional vicinage presumption protected the structural interests of the jury system, as well as the rights of the defendant.

Id. In fact, provisions regarding venue appear not once but twice in the Constitution, in both the Sixth Amendment[8] and in Article 3, which provides:

> The Trial of all crimes, except in Cases of Impeachment, shall be by Jury; and such trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. Const., Article 3, section 2, clause 3.

> The Constitution makes it clear that determination of proper venue in a criminal case requires determination of where the crime was committed.... The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place.

United States v. Cores, 356 U.S. 405, 407 (1958). See also United States v. Johnson, 323 U.S. 273, 276 (1944) (Frankfurter,

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[8] The Sixth Amendment technically refers to the place from which the jury is to be selected. It is Article 3, section 2, clause 3 of the Constitution that refers to the place where the trial is to be held. Traditionally, however, the Sixth Amendment has "the impact of a venue provision" and has been so construed by the courts. Norman Abrams, Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula, 9 U.C.L.A. Rev. 751, n.1 (1962).

J.) ("Questions of venue in criminal cases ... are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed.")

When a statute defining an offense does not expressly indicate where a criminal act is deemed to have been committed, the site of the charged offense "must be determined from the nature of the crime alleged and the location of the act or acts constituting it . . ." United States v. Cabrales, 524 U.S. 1, 5 (1998). See also United States v. Rodriguez-Moreno, 526 U.S. 275 (1999).

Robles' trades, made through an on-line brokerage from a desktop computer in Dallas, were "executed" in the Southern District of New York to the extent that, perhaps, an unidentified person or computer in New York City processed them. The Second Circuit, however, was unwilling to hold that such acts by a machine or by an unidentified person who was not the defendant or his co-conspirator were by themselves sufficient to place venue in the Southern District. Instead, it fashioned a new rule under which venue will lie if defendant intended or could foresee where his on-line trades would ultimately be executed, but would not lie if such intention or foresight was not present, introducing a level of uncertainty that did not exist under prior law. Certainly, although differing formulations of the venue test have been stated, venue has not before turned on a defendant's individual state of mind – his mens rea.

Heretofore, venue has been a matter of locus delicti. In determining the locus delicti of an offense, this Court has directed the lower courts to "identify the conduct constituting the offense . . . and then discern the location of the commission of the criminal acts." Rodriguez-Moreno, supra, 526 U.S. at 279. That endeavor is hard enough. Though from time to time the government has argued for venue based on grounds in addition to locus delicti, this Court has not been quick to embrace

rationales permitting venue based on something other than where the defendant or a partner in crime engaged in criminal conduct. Thus, in Rodriguez-Moreno, this Court declined to express an opinion as to whether venue "also may permissibly be based upon the effects of a defendant's conduct in a district other than the one in which the defendant performs the acts constituting the offense." 526 U.S. at 279, n.2.

Additionally, in the instant case, the trial court charged the jury that the burden of proof on the issue of venue was by a preponderance of the evidence. By upholding the preponderance of the evidence standard, the Second Circuit has applied a standard of proof less than that which the Constitution requires.

In United States v. Gaudin, 515 U.S. 506 (1995), this Court held that the Due Process Clause and the Sixth Amendment guarantee a defendant the right to have a jury determine every element of the crime charged beyond a reasonable doubt.

Nonetheless, the court below relied on a line of Second Circuit cases, including United States v. Bala, 236 F.3d 87 (2d Cir. 2000), and United States v. Middlemiss, 217 F.3d 112 (2d Cir. 2000), reciting the preponderance standard.

Although a long string of cases from the Second Circuit as well as other Circuits have stated and restated, without analysis, that venue may be proved by a preponderance, the preponderance rule has no reasoned basis and it is constitutionally suspect. In the Second Circuit, the principle can be traced back to Blair v. United States, 32 F.2d 130, 132 (8th Cir. 1929). The Blair Court, in 1929, selected the preponderance standard based on the results of its informal survey of the standards used at that time in civil and criminal cases in 13 States, from which it determined that the preponderance standard was more commonly used in those States than the beyond a

reasonable doubt standard. Other Second Circuit cases lead back to Younge v. Unites States, 242 F 788 (4th Cir. 1917), which cites only 1 Underhill's Criminal Evidence, § 36, for the proposition that proof of venue beyond a reasonable doubt is not required.[9]

Where justification is attempted, the preponderance standard has been defended on the ground that venue is not a "substantive" or "essential" element of the crime. As the Third Circuit wrote recently:

> When Courts describe venue as an element, they often distinguish it from 'substantive' or 'essential' elements. See United States v. Kaytso, 868 F. 2d 1020, 1021 (9th Cir. 1988); United States v. Griley, 814 F. 2d 967, 973 (4th Cir. 1987); [United States v.] Miller, 111 F. 3d [747,] 749 [(10th Cir. 1997)]; Wilkett v. United States, 655 F. 2d 1007, 1011 (10th Cir. 1981). The Fifth Circuit has explained that while venue is an element, it will be protected less vigorously than other elements. See [United States v.] Winship, 724 F. 2d [1116,] 1124 [(5th Cir. 1984)]. Likewise, the Seventh Circuit has recognized that while one may call venue an element, 'it is an element more akin to jurisdiction than to the substantive elements of the crime.' United States v. Massa, 686 F. 2d 526, 530 (7th Cir. 1982) (citing [United States v.] White, 611 F. 2d. [531,] 536 [(5th Cir.), cert.

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[9] A more recent edition of the Underhill treatise shows that, as of 1973, the states were almost equally divided on the burden of proof, 14 requiring proof beyond a reasonable doubt and 16 requiring only proof by a preponderance. 1 Underhill's Criminal Evidence, § 98 (6th ed. 1973).

> denied, 446 U.S. 992 (1980)]. Put another way, '[v]enue is wholly neutral; it is a question of procedure, more than anything else, and it does not either prove or disprove the guilt of the accused.' Wilkett, 655 F. 2d at 1011.

United States v. Perez, 280 F. 3d 318, 330 (3d Cir.), cert. denied, 537 U.S. 859 (2002).

Even so, the federal caselaw on the subject is not in complete accord. In United States v. Andrus, 775 F.2d 825, 846 (7th Cir. 1985), the Seventh Circuit, citing United States v. Jones, 174 F.2d 746, 748 (7th Cir. 1949), stated that "[v]enue is an essential element of an offense that the government must prove beyond a reasonable doubt." The Third Circuit only recently adopted the preponderance standard for venue, resolving a question which that Circuit had reserved 20 years earlier. See Perez, supra, 280 F.3d at 330.

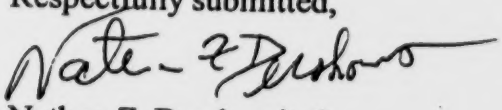
Given that defendant's venue rights in a federal prosecution are rooted in our nation's history and in our Constitution, and this Court has squarely held that every element of a crime must be proved beyond a reasonable doubt, these cases cannot provide a sufficient legal basis for upholding the preponderance standard.

In light of Gaudin, this Court should grant certiorari and determine whether the preponderance standard of proof – an obvious anomaly – is constitutionally valid.

CONCLUSION

This Petition raises two important constitutional issues about which the law is in conflict. Had the defendant prevailed on any of these issues, the government likely would have sought certiorari because of their significance. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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April 14, 2004

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2002
(Argued June 17, 2003 Decided: October 24, 2003)
Docket No. 03-1102

UNITED STATES OF AMERICA,

Appellee,

—v.—

RICHARD A. SVOBODA,

Defendant,

MICHAEL A. ROBLES,

Defendant-Appellant.

Before:

LEVAL, RAGGI, *Circuit Judges*, and SCULLIN,[1]

Chief District Judge.

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[1] The Honorable Frederick J. Scullin, Jr., Chief United States District Judge for the Northern District of New York, sitting by designation.

Appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York, the Honorable Richard M. Berman, J., presiding.

AFFIRMED.

ALAN M. DERSHOWITZ, ESQ., Cambridge, Massachusetts (Nathan Z. Dershowitz, Esq., Dershowitz, Eiger & Adelson, P.C., New York, New York, on the brief), *for Defendant-Appellant.*

STEVEN R. PEIKEN, Assistant United States Attorney, Southern District of New York, New York, New York (James B. Comey, United States Attorney, Jason Sabot and Gary Stein, Assistant United States Attorneys, on the brief), *for Appellee.*

SCULLIN, Chief District Judge:

Michael A. Robles appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York, the Honorable Richard M. Berman, J., presiding. On October 3, 2002, after a thirteen-day jury trial, Robles was convicted of one count of conspiracy to commit securities and tender offer fraud (Count 1) pursuant to 18 U.S.C. § 371 and thirteen individual securities and tender offer

fraud (Counts 2-6, 9-11, 13 and 15-18)[2] pursuant to 15 U.S.C. §§ 78j(b) & 78ff, 17 C.F.R. §§ 240.10b-5 & 240.14e-3(a), and 18 U.S.C. § 2.[3] On appeal, Robles principally contends that (1) the district court erred in giving a conscious avoidance instruction with respect to the conspiracy charge and (2) venue was improper in the Southern District of New York as to all counts. For the reasons set forth below, we affirm.

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[2] The jury failed to reach a verdict with respect to the remaining eight counts of securities and tender offer fraud charged in the indictment.

[3] In short, Section 10(b) of the Securities Exchange Act of 1934 (the "'34 Act"), 15 U.S.C. § 78j(b), prohibits the use of "any manipulative or deceptive device or contrivance" in the purchase or sale of securities; 17 C.F.R. § 240.10b-5, in turn, includes trading on the basis of insider information, i.e., "material nonpublic information," within the definition of "manipulative or deceptive device or contrivance;" Section 14(e) of the '34 Act, 15 U.S.C. § 78n(e), and 17 C.F.R. § 240.14e-3(a) set forth similar provisions concerning the use of "fraudulent, deceptive, or manipulative acts or practices" in connection with tender offers; 15 U.S.C. § 78ff prohibits "willful" violations of the above provisions; and, finally, 18 U.S.C. § 2 renders an accomplice to a federal offense punishable as a principal.

I. BACKGROUND

At trial, the Government sought to prove that Robles and his long-time friend Richard Svoboda[4] engaged in a conspiracy to commit securities and tender offer fraud for profit between approximately November 1994 and December 1997. During that period, Svoboda was employed in Dallas, Texas, as a "credit policy officer" at Nations Bank, a financial institution engaged, *inter alia*, in commercial lending. As a credit policy officer, Svoboda was charged with structuring and approving loans to corporate clients. In the course of his duties at Nations Bank, Svoboda was privy to confidential information about Nations Bank's clients, such as earnings information and merger and acquisition plans. Svoboda testified that he obtained confidential information about certain securities and tender offers through his position at Nations Bank; that he passed the information to Robles, who, in turn, used the insider information to make

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[4] Svoboda was originally indicted along with Robles but later entered into a plea agreement with the Government in which he agreed, *inter alia*, to testify against Robles at trial.

trades; and that he and Robles shared the profits realized from their illicit trading. Svoboda further testified that he and Robles discussed and agreed upon the details of the above-described scheme and that Robles was fully aware that he was trading on the basis of unlawfully obtained insider information. Robles, however, took the stand in his own defense and denied knowledge of the unlawful source of Svoboda's information.

At the close of evidence, the Government requested a conscious avoidance instruction; i.e., an instruction to the effect that the Government could satisfy its obligation to prove Robles' knowledge of the unlawful source of the information by proving that he deliberately avoided acquiring that knowledge. Over Robles' objection, the district court granted the Government's request and included a conscious avoidance instruction in the jury charge.[5]

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[5] While objecting to the giving of a conscious avoidance charge, Robles requested that the district court utilize Judge Sand's model instruction rather than the Government's proposed instruction. The district court granted Robles' request and instructed the jury as follows:

II. DISCUSSION

A. The Conscious Avoidance Instruction

The instant case requires us to determine whether and under what circumstances the doctrine of conscious avoidance may be employed in a conspiracy prosecution. Robles' principal contention on appeal is that the conscious avoidance doctrine

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> In determining whether the defendant acted knowingly, you may consider whether the defendant deliberately closed his eyes to what would otherwise have been obvious to him. If you find, beyond a reasonable doubt, that the defendant acted with a conscious purpose to avoid learning the truth, that he was trading on the basis of insider information, then this element may be satisfied.
>
> However, guilty knowledge may not be established by demonstrating that the defendant was merely negligent, foolish or mistaken. If you find that the defendant was aware of a high probability that he was trading on the basis of insider information, and that the defendant acted with a deliberate disregard of the facts, you may find that the defendant acted knowingly. However, if you find that the defendant actually believed that he was not receiving insider information, he may not be convicted.

A. 106.

cannot be employed in the course of establishing a conspiratorial agreement between two persons. We disagree.

1. Proof of a conspiratorial agreement

Robles was convicted of conspiracy to engage in insider trading under 18 U.S.C. § 371, the general federal conspiracy statute, which provides that

> [i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 371. A conspiracy conviction under § 371 requires proof of three essential elements: (1) an agreement among two or more persons, the object of which is an offense against the United States; (2) the defendant's knowing and willful joinder in that conspiracy; and (3) commission of an overt act in furtherance of the conspiracy by at least one of the alleged co-conspirators. *See, e.g., United States v. Pinckney*, 85 F.3d 4, 8 (2d Cir. 1996) (citing *United States v. Montour*, 944 F.2d 1019,

1024 (2d Cir. 1991)); *see also* 2 Wayne R. LaFave, ***Substantive Criminal Law*** § 12.2 (2d ed. 2003); 1 L. Sand *et al.*, ***Modern Federal Jury Instructions*** 19-3 ("that the defendant knowingly and willfully became a member of the conspiracy").[6]

"The gist of conspiracy is, of course, agreement." *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1191 (2d Cir. 1989); *see Iannelli v. United States*, 420 U.S. 770, 777 (1975) ("Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act.") (citations omitted). "'A conspiracy need not be shown by proof of an explicit agreement but can be established by showing that the parties have a tacit understanding to carry out the prohibited conduct.'" *United States v. Samaria*, 239 F.3d 228, 234 (2d Cir. 2001)

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[6] We note that this formulation of the elements of conspiracy under § 371 is somewhat redundant when applied to a scheme involving only two persons: "It is axiomatic that the existence of an agreement necessarily implies knowledge of the object of the agreement and the voluntary expression of assent to participate in its objectives." *United States v. Toler*, 144 F.3d 1423, 1425-26 (11th Cir. 1998). Put another way, to find that an agreement existed amongst the alleged conspirators, the finder of fact must necessarily find some knowledge of the aims of the agreement and the intent to bring them about.

(quotation omitted). In either case, "the evidence must be sufficient to permit the jury to infer that the defendant and other alleged coconspirators entered into a joint enterprise with consciousness of its general nature and extent." *Beech-Nut Nutrition Corp.*, 871 F.2d at 1191 (citing *United States v. Alessi*, 638 F.2d 466, 473 (2d Cir. 1980)).

Conspiracies are secretive by their very nature, and it is thus well-settled that the elements of a conspiracy may be proved by circumstantial evidence. *See Samaria*, 239 F.3d at 234 (citation omitted); *see also United States v. Desena*, 260 F.3d 150, 154 (2d Cir. 2001) ("The elements of a conspiracy may be proved by circumstantial evidence.") (citation omitted).

In certain conspiracy prosecutions, the Government often seeks to prove that a particular defendant joined a preexisting conspiracy. *See, e.g., United States v. Reyes*, 302 F.3d 48, 53 (2d Cir. 2002); *United States v. Ciambrone*, 787 F.2d 799, 806 (2d Cir. 1986). In other cases, the question is whether a conspiracy existed at all and, if so, whether a particular defendant was a party to the alleged conspiratorial agreement. *See, e.g., Beech-*

Nut Nutrition Corp., 871 F.2d at 1191-93 (discussing evidence of single versus multiple conspiracies); *United States v. Gaviria*, 740 F.2d 174, 183 (2d Cir. 1984). Of course, the nature of the evidence used to establish the existence of a conspiratorial agreement may vary slightly, depending on the circumstances of the case. In the case of a preexisting conspiracy, the critical evidentiary question is often whether the defendant joined in the charged conspiracy (1) with some knowledge of the conspiracy's unlawful aims and (2) with the intent of helping the scheme succeed. *See Reyes*, 302 F.3d at 53 (citations omitted). In other cases, the evidentiary question is frequently whether there is proof that the defendant (1) had knowledge of the unlawful aims of the charged scheme and (2) evinced, by his actions, an intention to further or promote its unlawful aims. *See Beech-Nut Nutrition Corp.*, 871 F.2d at 1191 (a conspiratorial agreement may be inferred where there is "'some indication that the defendant knew of and intended to further the illegal venture'") (*quoting United States v. Zambrano*, 776 F.2d 1091, 1095 (2d Cir. 1985)). The difference is not one of legal substance but only

of evidentiary emphasis depending on the circumstances of the case. In either case, the fundamental legal question is the same: whether the evidence establishes beyond a reasonable doubt that a particular defendant entered into an agreement with others with knowledge of the criminal purpose of the scheme and with the specific intent to aid in the accomplishment of those unlawful ends.

2. The conscious avoidance doctrine

"The conscious avoidance doctrine provides that a defendant's knowledge of a fact required to prove the defendant's guilt may be found when the jury 'is persuaded that the defendant consciously avoided learning that fact while aware of a high probability of its existence.'" *Samaria*, 239 F.3d at 239 (quoting *United States v. Finkelstein*, 229 F.3d 90, 95 (2d Cir. 2000)). "In such circumstances, a conscious avoidance instruction to the jury 'permits a finding of knowledge even where there is no evidence that the defendant possessed actual knowledge.'" *Id.* (quoting *United States v. Ferrarini*, 219 F.3d 145, 154 (2d Cir. 2000)).

3. The application of the conscious avoidance doctrine in the conspiracy context

Relying on dictum in one of our opinions, *United States v. Reyes*, 302 F.3d 48, 54 (2d Cir. 2002), Robles contends that "the doctrine of conscious avoidance cannot be used at all in the context of a two-person conspiracy." Appellant's Brief at 21. We disagree. The *Reyes* decision does not mean what Robles reads into it. Even if it did, it would not support his argument.

In *Reyes*, we upheld the defendant's conviction by the jury, overturning the district court's grant of a directed verdict. The defendant was in the business of selling auto parts. The jury found him guilty of engaging in the transportation and sale of stolen airbags and conspiracy to do the same. There was evidence that the defendant, when being interviewed by an FBI agent, said he was aware that the bags were stolen, making "an analogy to . . . when you see a friend using drugs, you see what's happening, but you turn the other way." *Reyes*, 302 F.3d at 52. In analyzing the sufficiency of the evidence to support the conviction, we found that the evidence was sufficient to prove

that the defendant knew the airbags were stolen, or in any event "thought the airbags were stolen, but deliberately avoided confirming that fact." *Reyes*, 302 F.3d at 56. We further found that evidence supported the defendant's intentional participation in the conspiracy.

Prior to analyzing the evidence, our opinion discoursed on the nature of the conscious avoidance doctrine and observed, "[We] do not permit the doctrine to be used to prove intent to participate in a conspiracy." *Id.* at 54. This observation played no role in the decision.

Robles relies on this sentence for his argument. His argument is essentially that conspiracy by definition requires the participation of two or more conspirators, both of whom must intend to participate. If intent to participate may not be proved by reliance on conscious avoidance, then in a case of only two conspirators where the prosecution must rely on the doctrine of conscious avoidance to prove intent to participate on the part of one, the necessary proof of intent to participate by at least two conspirators will be lacking.

This argument fails for three reasons. First, the statement in *Reyes* on which Robles relies was pure dictum. As noted, it played no role whatever in the decision, which was to *uphold* the defendant's conviction upon the jury's guilty verdict.[7] *Reyes* stands for the proposition that the conscious avoidance doctrine may be invoked to satisfy the requirement that a defendant know of the unlawful aims of the conspiracy. *See Reyes*, 302 F.3d at 55 ("the jury may use the conscious avoidance doctrine to establish the defendant's knowledge of the aims of the

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[7] The statement in Reyes was substantially quoted from dicta in several prior opinions, each upholding a conspiracy conviction. *See United States v. Tropeano*, 252 F.3d 653, 660 (2d Cir. 2001) (upholding conviction on a conscious avoidance charge); *United States v. Ferrarini*, 219 F.3d 145, 156 (2d Cir. 2000) (upholding a conviction where instructions permitted the jury to infer only "knowledge of the *unlawful* objectives of the conspiracy" from conscious avoidance); *United States v. Eltayib*, 88 F.3d 157, 170 (2d Cir. 1996) (same); *United States v. Lanza*, 790 F.2d 1015, 1023 (2d Cir. 1986) (finding "a conscious avoidance charge . . . appropriate vis-a-vis knolwedge of the objectives of the scheme"). Since each opinion upheld the conviction on a finding that the charge given on conscious avoidance was appropriate, the further observation that the conscious avoidance charge is not given in certain circumstances played no role in explaining the decision. In each case, it was dictum.

conspiracy").

Second, the district court's instruction did not conflict with the *Reyes* dictum. The court instructed the jury, as quoted above, only to the effect that, "[i]n determining whether the defendant acted *knowingly*, you may consider whether the defendant deliberately closed his eyes to what would otherwise have been obvious to him." A. 106 (emphasis added). In giving the instruction, the court made no reference to the defendant's "intent to participate."

Finally, we doubt that the dictum in *Reyes* intended what the defendant reads into it. The broad assertion that conscious avoidance may not be used to prove "intent to participate" has a capacity to cause confusion, and Robles' argument draws on that confusion. Properly understood, "intent to participate" is a shorthand phrase used to encompass both aspects of the joinder element of conspiracy, i.e., a defendant's knowledge or awareness of the illegal nature of the charged activity and his

intent to advance the illegal objective.[8]

Thus, when *Reyes* states that conscious avoidance cannot prove intent to participate, we do not understand it to mean that conscious avoidance cannot be used to prove any aspect of intent to participate; it simply means that just as actual knowledge of the illegal purpose of a conspiracy is insufficient to prove a defendant's joinder in a conspiracy, so conscious avoidance of such knowledge is also insufficient. There must be further proof that the defendant joined in the illegal agreement with the intent

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[8] It is to ensure that jurors do not mistakenly conflate the knowledge and intent aspects of the *mens rea* necessary to prove a defendant's joinder in a conspiracy that trial judges routinely charge:

> Mere knowledge [of a criminal conspiracy] . . . without participation, in the unlawful plan is not sufficient. Moreover, the fact that . . . a defendant, without knowledge, merely happen[s to act] to further the purposes or objectives of the conspiracy, does not make the defendant a member . . . . What is necessary is that the defendant must have participated with knowledge of at least some of the purposes or objectives of the conspiracy and with the intention of aiding in the accomplishment of those unlawful ends.

1 L. Sand *et al.*, *Modern Federal Jury Instructions* 18-6.

of helping it succeed in its criminal purpose.

In sum, we can see no reason why the factfinder may not rely on conscious avoidance to satisfy at least the knowledge component of intent to participate in a conspiracy. Moreover, we firmly reject Robles' contention that a conscious avoidance charge may not be used in a two-person conspiracy. Whether the conspiracy is among two members or more, a defendant's conscious avoidance of knowledge of its illegal purpose may substitute for knowledge of the illegal purpose.[9]

In making this argument, Robles contends that a two-person conspiracy requires proof that each alleged co-conspirator possessed actual knowledge of the unlawful objectives of the charged scheme – otherwise, he argues, there can be no illicit

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[9] Significantly, Robles *does not* challenge the sufficiency of the evidence supporting his conspiracy conviction. Accordingly, we assume, for purposes of this appeal, that the evidence was, in fact, sufficient to establish beyond a reasonable doubt (1) Robles' knowledge that he was trading on inside information and (2) his active participation in the charged scheme. We have no difficulty concluding that this evidence provides a proper evidentiary foundation, as a matter of law, to infer the existence of an agreement to violate federal securities laws.

agreement. This argument presupposes that a finding of conscious avoidance stands on a lesser legal footing than a finding of actual knowledge. Our precedents, however, establish that knowledge consciously avoided is the legal equivalent of knowledge actually possessed. *See, e.g., United States v. Finkelstein*, 229 F.3d 90, 95 (2d Cir. 2000) ("one who deliberately avoided knowing the wrongful nature of his conduct is as culpable as one who knew"). The defendant's conscious avoidance of knowledge of the unlawful aims of the conspiracy thus may be invoked as the equivalent of knowledge of those unlawful aims. In the context of a two-person conspiracy, intent to participate may be shown by a finding that the defendant either knew, or consciously avoided knowing, the unlawful aims of the charged scheme and intended to advance those unlawful ends.

4. Factual predicate for the conscious avoidance instruction

Having found no doctrinal obstacle to employing a conscious avoidance instruction in the context of a two-person

conspiracy, we now turn to the question of whether the facts in the instant case support such an instruction.

We note at the outset that Robles raised his challenge to the factual predicate for the conscious avoidance instruction in a footnote. *See* Appellant's Brief at 31 n.15. It is well-established in this Circuit that "'[w]e do not consider an argument mentioned only in a footnote to be adequately raised or preserved for appellate review.'" *United States v. Quinones*, 317 F.3d 86, 90 (2d Cir. 2003) (quoting *United States v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir. 1993)) (other citations omitted). In any event, for the reasons that follow, we find Robles' argument on this point unpersuasive.

A conscious avoidance instruction "may only be given if (1) the defendant asserts the lack of some specific aspect of knowledge required for conviction, . . . and (2) the appropriate factual predicate for the charge exists, i.e., 'the evidence is such that a rational juror may reach [the] conclusion beyond a reasonable doubt . . . that [the defendant] was aware of a high probability [of the fact in dispute] and consciously avoided

confirming that fact[.]'" *Ferrarini*, 219 F.3d at 154 (internal citations omitted). The second prong of this test thus has two components – there must be evidence that the defendant (1) was aware of a high probability of the disputed fact and (2) deliberately avoided confirming that fact. *See Lara-Velasquez*, 919 F.2d 946, 951-52 (5th Cir. 1990) (quoting *United States v. Alvarado*, 838 F.2d 311, 314 (9th Cir. 1988)) (footnote omitted). Of course, "the same evidence that will raise an inference that the defendant had actual knowledge of the illegal conduct ordinarily will also raise the inference that the defendant was subjectively aware of a high probability of the existence of illegal conduct." *Id.* at 952. Moreover, the second prong may be established where, "[a] defendant's involvement in the criminal offense may have been *so overwhelmingly suspicious* that the defendant's failure to question the suspicious circumstances establishes the defendant's purposeful contrivance to avoid guilty knowledge." *Id.* (citations omitted) (emphasis in original).

Here, the first prerequisite is easily met, as Robles denied knowledge of the unlawful source of Svoboda's investment

advice. The second prerequisite is also easily met. First the source of Svoboda's information was suspicious – Robles knew that Svoboda was a credit officer at Nations Bank and would thus be privy to confidential financial information. Second, the timing of Robles' trades was suspicious – for example, some of Robles' trades occurred as little as a day before a tender offer announcement. Third, the success of the trades was suspicious – Robles realized large returns, up to 400%, on trades based on Svoboda's advice. These facts suggest a high probability that Svoboda's tips were based on inside information and that any lack of actual knowledge on Robles' part was due to a conscious effort to avoid confirming an otherwise obvious fact. We therefore find that there was a sufficient factual predicate in the instant case to warrant a conscious avoidance instruction.[10]

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[10] The parties, as well as the district court, considered the case to be a "credibility case" from the outset. In essence, if the jury believed Svoboda's testimony that he and Robles jointly developed and executed the charged scheme, conviction would surely follow. Likewise, if the jury disbelieved Svoboda and credited Robles' testimony, acquittal, at least on the conspiracy charge, would presumably follow.

5. Substance of the conscious avoidance instruction

Finally, Robles argues that, even if the conscious avoidance instruction was theoretically proper, its content impermissibly diluted the *mens rea* requirement for the conspiracy charge, i.e., specific intent to engage in the proscribed conduct, and thus allowed the jury to convict on a negligence

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Robles thus argues that allowing the jury to use a conscious avoidance theory to establish his knowledge of the unlawful aims of the charged scheme unfairly withdrew the credibility issue from the jury. Specifically, Robles argues that the jury was permitted to convict even if it disbelieved Svoboda's testimony entirely but nevertheless concluded that Robles consciously avoided confirming the unlawful source of Svoboda's tips.

This argument is foreclosed by our conclusion that an appropriate factual predicate for the conscious avoidance instruction existed in this case. *Cf. United States v. Chen*, 913 F.2d 183, 192 (5th Cir. 1990) (noting that "the court is required to 'instruct the jury on all aspects of a case in order for them to reach a fair and proper verdict'") (quotation omitted). In any event, we note that it was Robles' own testimony that raised the issue of conscious avoidance. *Cf. United States v. Aina-Marshall*, 336 F.3d 167, 171 (2d Cir. 2003) ("When a defendant charged with knowingly possessing contraband items takes the stand and admits possession of the contraband but denies having known of the nature of the items, a conscious avoidance charge is appropriate in all but the highly unusual – perhaps non-existent – case."); *Chen*, 913 F.2d at 192 (same).

theory. We need not reach the merits of this contention, however, as Robles' trial counsel specifically requested the charge that was given. *See Tuttle v. Equifax Check*, 190 F. 3d 9, 15-16 (2d Cir. 1999) (citing *Lavoie v. Pacific Press & Shear Co.*, 975 F.2d 48, 55 (2d Cir.1992) ("Failure to object to a jury instruction or the form of an interrogatory prior to the jury retiring results in a waiver of that objection."); *United States v. Young*, 745 F.2d 733, 752 (2d Cir. 1984) ("[N]ot even the plain error doctrine permits reversal on the ground that the trial court granted a defendant's request to charge.")) (other citations omitted); see also Fed. R. Crim. P. 30 ("A party who objects to any portion of the instructions. . . must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate . . . . Failure to object in accordance with this rule precludes appellate review . . . .").

Even if we were to consider the merits of Robles' challenge to the content of the conscious avoidance instruction, his argument is unavailing. To begin, the conscious avoidance instruction itself made clear that "guilty knowledge may not be

established by demonstrating that the defendant was merely negligent, foolish or mistaken." *See* A. 106; *United States v. Lalley*, 257 F.3d 751, 756 (8th Cir. 2001) (rejecting the argument that a conscious avoidance charge allowed the jury to convict on a negligence theory where charge clearly cautioned that a finding of "negligence, mistake, or carelessness" was insufficient) (citing *United States v. Uphoff*, 232 F.3d 624, 626 (8th Cir. 2000)). Moreover, the jury charge, taken as a whole, repeatedly and emphatically instructed the jury that it had to find that Robles intentionally engaged in the charged scheme. *See, e.g.*, A. 97 ("[T]he government must prove beyond a reasonable doubt that Mr. Robles knowingly, *willfully* and unlawfully entered into the conspiracy . . . . Willfully means to act with knowledge that one's conduct is unlawful *and with the intent* to do something that the law forbids, . . ."') (emphasis added). Accordingly, although the conspiracy charge made reference to knowledge of the illegal scheme, it also "clearly and conjunctively" required a finding of intent to participate. *Cf. Ferrarini*, 219 F.3d at 156 ("Although this definition of 'willful' includes references to

knowledge, it also clearly and conjunctively requires a fining of intentional purposefulness."). We therefore perceive no error in the substance of the charge.[11]

B. Venue

With respect to venue, all thirteen of the trades underlying the substantive securities and tender offer fraud counts were executed on the New York Stock Exchange ("NYSE") or American Stock Exchange ("AMEX"), both of which are located in the Southern District of New York. After each trade was completed, Robles received a written confirmation indicating the exchange at which the trade was executed. *See, e.g.*, A. 115 (trade confirmation corresponding to

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[11] Robles additionally argues that the placement of the conscious avoidance instruction amongst various general instructions at the end of the charge was improper. We disagree. The instruction clearly applied to any aspect of knowledge for which the appropriate factual predicate existed. Moreover, the wording of the instruction made clear that it applied to the question of whether Robles knew the true nature of the Svoboda's information. We therefore find that the placement of the charge was not in error.

Count 9 of the Indictment).

Robles asserts that this is too tenuous a connection to the Southern District to establish venue. In addition, Robles contends that the jury instruction on venue was fatally flawed. We disagree.

1. Whether venue was proper in the Southern District of New York

Questions of jurisdiction and venue are questions of law, and this Court reviews them *de novo*. *See United States v. Kim*, 246 F.3d 186, 188 (2d Cir. 2001) (citing *United States v. White*, 237 F.3d 170, 172 (2d Cir. 2001)).

A criminal defendant has the right to be tried in the "district wherein the crime shall have been committed[.] U.S. Const. amend. VI; *see* Fed. R. Crim. P. 18. [W]here the acts constituting the crime and the nature of the crime charged implicate more than one location, the constitution does not command a single exclusive venue." *United States v. Reed*, 773 F.2d 477, 480 (2d Cir. 1985). Rather, venue is proper "in any

district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237(a).

Where a federal statute defining an offense does not explicitly indicate where a criminal act is deemed to have been committed, "the site of a charged offense '"must be determined from the nature of the crime alleged and the location of the act or acts constituting it . . ."'" *United States v. Cabrales*, 524 U.S. 1, 5 (1998) (quoting *United States v. Cabrales*, 109 F.3d 471, 472 (8th Cir. 1997) (quoting *United States v. Anderson*, 328 U.S. 669, 703 (1946))). This Court has therefore held that, "[i]n a conspiracy prosecution, 'venue is proper in any district in which an overt act in furtherance of the conspiracy was committed by any of the coconspirators.'" *United States v. Smith*, 198 F.3d 377, 382 (2d Cir. 1999) (quoting *United States v. Naranjo*, 14 F.3d 145, 147 (2d Cir. 1994) (quotation and citation omitted)). With respect to the individual securities and tender offer fraud counts, the venue provision of the Securities Exchange Act of 1934 (the "'34 Act") provides that "[a]ny criminal proceeding may be brought in the district wherein any act or transaction constituting

the violation occurred." 15 U.S.C. § 78aa.

Robles likens the instant case to *United States v. Bezmalinovic*, 962 F. Supp. 435 (S.D.N.Y. 1997), in which the court held that purely ministerial functions that are unintended and unforeseeable to a defendant are insufficient to establish venue. *See id.* at 441 (venue in bank fraud prosecution improper in the Southern District of New York where the defendant committed all relevant acts at banks in the Eastern District of New York and the only contact with the Southern District was the banks' cashing and payment of checks through their clearing houses in Manhattan). Robles argues that he neither intended nor could he have reasonably foreseen that the trades in question would be executed on the NYSE or AMEX.

The Government, on the other hand, relies on *United States v. Kim*, in which this Court held that knowingly causing an act in furtherance of the charged offense to occur in the district in question is sufficient to establish venue. *See Kim*, 246 F.3d at 192 (venue proper where the defendant approved fraudulent invoices knowing that the victim paid its vendors from a bank

located in the Southern District of New York).

Taken together, *Kim* and *Bezmalinovic* indicate that venue is proper in a district where (1) the defendant intentionally or knowingly causes an act in furtherance of the charged offense to occur in the district of venue or (2) it is foreseeable that such an act would occur in the district of venue. *See Kim*, 246 F.3d at 192 (finding venue proper where the defendant "caused communications to be transmitted into and out of the Southern District when he approved fraudulent invoices knowing that [the victim] paid its vendors from New York banks"); *Bezmalinovic*, 962 F. Supp. at 438 (finding venue improper because the defendant neither intended nor could have foreseen the acts that occurred in the district of venue).

In the instant case, there is nothing in the record to indicate that Robles intended the trades in question to be executed on either NYSE or AMEX. However, the fact that Robles was a savvy investor means that he could reasonably foresee that his trades would likely be executed on either NYSE or AMEX. More importantly, however, Robles had actual notice

that his trades were being executed on NYSE and AMEX; the Government introduced individual trade confirmations from Robles' broker, Charles Schwab, reflecting that eight of the transactions in question were executed on NYSE or AMEX. *See* A. 109-116. Accordingly, unlike *Bezmalinovic*, there is evidence suggesting that Robles either knew, or could reasonably foresee, that his trades would be executed in the Southern District of New York. At a minimum, as soon as Robles received the first trade confirmation, it became foreseeable that his trades could be executed in the Southern District. This case is thus more analogous to *Kim*, as Robles ordered trades knowing that they would be executed in the Southern District.[12]

For the foregoing reasons, we find that the execution of

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[12] Robles also argues that venue in the Southern District of New York does to comport with the basic constitutional requirement that "the criminal acts in question bear 'substantial contacts' with any given venue." *United States v. Saavedra*, 223 F.3d 85, 93 (2d Cir. 2000) (quoting *United States v. Reed*, 773 F.2d 477, 481 (2d Cir. 1985)). We have no difficulty concluding that offenses involving trading on exchanges located in Manhattan bear a sufficient nexus with the Southern District to comport with this basic constitutional command.

trades on the New York Stock Exchange and American Stock Exchange is sufficient to establish venue in the Southern District of New York.[13]

2. The venue instruction

Robles additionally argues that, even if venue in the Southern District was theoretically proper, the jury instruction on

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[13] We note that this conclusion is consistent with a number of district court decisions in this Circuit that have upheld venue where the only relevant contact to the venue was that various trades were executed in the district. *See, e.g., Sec. & Exch. Comm'n v. Thrasher*, No. 92 Civ. 6987, 1993 WL 37044, *2 (S.D.N.Y. Feb. 8, 1993) (finding venue proper in the Southern District based on execution of trades on the New York Stock Exchange) (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Rajcher*, 609 F. Supp. 291, 293 (S.D.N.Y. 1985) (citing *Blau v. Lamb*, 242 F. Supp. 151, 159-60 (S.D.N.Y. 1965), *aff'd*, 363 F.2d 507 (2d Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967)); *Grossman v. Young*, 70 F. Supp. 970, 972 (S.D.N.Y. 1947)). Robles contends that *Thrasher*, and the cases cited therein involved civil enforcement of the securities laws and are thus inapposite. Indeed, the '34 Act's civil venue provision is somewhat broader than its criminal counterpart, providing that venue is proper in a district whereas criminal proceeding could be brought "or in the district wherein the defendant is found or is an inhabitant or transacts business . . . ." 15 U.S.C. § 78aa. These cases, however, appear to have been decided under the test set forth in the criminal venue provision and are thus relevant and instructive in the instant case.

venue was fatally flawed.[14] To begin, because Defendant failed to object to the substance of the venue instruction, our review is for plain error. *See* Fed. R. Crim. P. 30(d), 52(b); *United States*

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[14] At the close of evidence, the district court instructed the jury that

> you must consider the issue of venue; namely, whether any act in furtherance of the unlawful activity occurred within the Southern District of New York, which includes Manhattan. In this regard, the government need not prove that the crime charged was committed in the Southern District of New York or that the defendant or any alleged coconspirator was even physically present here. It is sufficient to satisfy the venue requirement if any act in furtherance of the crimes charged occurred within the Southern District of New York. Such an act would include, for example, the execution or settlement of a securities trade within this district.
>
> . . .
>
> On this venue requirement only, the government meets its burden of proof if it establishes by a preponderance of the evidence that an act in furtherance of the crimes occurred within this district.

A. 105-06.

v. Crowley, 318 F.3d 401, 414 (2d Cir. 2003).[15] "For an error to be a 'plain error[ ] or [a] defect[ ] affecting substantial rights.' Fed. R. Crim. P. 52(b), it must be a 'clear' or 'obvious' deviation from current law that 'affected the outcome of the district court proceedings.'" *Crowley*, 318 F.3d at 414-15 (citing *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770 (1993)).

Since we conclude that the jury instruction on venue properly stated the law in this Circuit, we find that there was no error, plain or otherwise, in this aspect of the charge. First, Robles argues that venue is an essential element of a criminal charge and must, therefore, be proven beyond a reasonable doubt. *See generally United States v. Gaudin*, 515 U.S. 506 (1995) (holding that "materiality" of allegedly false statements is an essential element of the crime of making material false statements to a federal agency and thus must be submitted to the

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[15] Robles maintains that he did object to the content of the venue instruction. *See* Appellant's Reply Brief at 19-20. There is nothing in the record, however, to substantiate Defendant's claim. *Cf.* S.A. 188 (requesting that no charge on venue be given).

jury and proven beyond a reasonable doubt). However, this Court has repeatedly held that venue is *not* an essential element of the crime charged, *see, e.g., Smith*, 198 F.3d at 382 (citation omitted), and thus only requires proof by a preponderance of the evidence. *See, e.g., United States v. Bala*, 236 F.3d 87, 95 (2d Cir. 2000) ("[T]he government must prove venue by a preponderance of the evidence.") (citation omitted); *United States v. Middlemiss*, 217 F.3d 112, 121 (2d Cir. 2000) ("The government must prove, 'by a preponderance of the evidence, that some part of the crime was committed within the district of the prosecution.'") (quotation omitted). In the instant case, the district court properly instructed the jury that "the government meets its burden of proof if it establishes by a preponderance of the evidence that an act in furtherance of the crimes occurred within his district." A. 106.

Second, Robles contends that the substantive test for venue should have read any act "constituting the offense" rather than any act "in furtherance" of the unlawful activity. In the instant case, the crimes charged are *trading* on insider

information and conspiracy to *trade* on insider information. *Cf. United States v. Rodriguez-Moreno*, 526 U.S. 275, 280 (1999) (so-called "verb test" is a useful analytical tool for determining where the relevant offense conduct occurred). We find the distinction that Robles urges unpersuasiveness; the acts in furtherance, i.e., the trades executed in the Southern District, are also the acts constituting the offenses charged. In any event, the instruction that the district court gave was proper. *See United States v. Potamitis*, 739 F.2d 784, 791 (2d Cir. 1984) (venue proper in any district in which some part of offense conduct occurred).

For the foregoing reasons, we find no error in the venue instruction.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is hereby

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the day of January two thousand four.

UNITED STATES OF AMERICA,

Appellee,

v.

Docket No. 03-1102

RICHARD A. SVOBODA,

Defendant,

United States Court of Appeals Second Circuit Filed Jan 16 2004 Roseann B. Mackechnie, Clerk

MICHAEL A. ROBLES,

Defendant-Appellant.

A petition for panel rehearing en banc having been filed by the appellant Michael Robles.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie
By: Artur M. Heller
Artur M. Heller
Motions Staff Attorney